SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLE

IN THE

United States Supreme Court

October Term, 1974

No. 74-697

MAHONEY, *et. al.*
Petitioners,

v.

PHILADELPHIA HOUSING AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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Respondent.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW.

In accordance with Rule 23(1.) (a) of this Court, Petitioners have appended hereto, as part of the Appendix, copies of the Memorandum Opinion of the Court of Common Pleas of Philadelphia County, dated August 1, 1973, and the Opinion of the Commonwealth Court of Pennsylvania, dated June 5, 1974, affirming the Common Pleas Court. The Memorandum Opinion of the Court of Common Pleas is not reported. The Commonwealth Court Opinion is officially reported at 13 Pa. Cmwlth. Court 243 and unofficially reported at 320 A. 2d 459.

By an unreported, per curiam order dated September 5, 1974, the Supreme Court of Pennsylvania denied the Petition

for Allowance of Appeal from the judgment of the Commonwealth Court filed by the Petitioners below. This September 5th order of the Pennsylvania Supreme Court constitutes disposition of the last appellate remedy available to Petitioners in the Pennsylvania state court system.

THIS COURT'S JURISDICTION.

By this Petition, Petitioners seek review of the final action of the Pennsylvania Supreme Court referred to above, as well as a review of the decisions in this case by the Philadelphia Court of Common Pleas and the Pennsylvania Commonwealth Court.

That this Court has jurisdiction to review the judgments below, by a Writ of Certiorari, is clear from paragraph (3) of 28 U.S.C. §1257, which affords this Court jurisdiction to review "final judgments or decrees rendered by the highest court of the State in which a decision could be had . . . (3) by Writ of Certiorari . . . where any title, rights, privilege or immunity is specially set up or claimed under Constitution, treaties or statutes of . . . the United States." As we shall see more fully below, in the proceedings in the Pennsylvania state courts, Petitioners asserted that they were vested in a property right or interest in and to their employment with Respondent, Philadelphia Housing Authority, an agent of the Commonwealth of Pennsylvania, which right or interest was extinguished by Respondent without first affording to Petitioners the due process of law preserved to them by the Fourteenth Amendment of the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW.

Where an employee of a state agency is employed pursuant to a written contract by which the agency assures to all employees that they will be discharged only for "just cause" and will, upon being notified of their discharge and upon their request, be afforded a hearing on the question of the propriety

of their discharge, does not the agency violate the Fourteenth Amendment's guarantee of due process of law upon discharging such an employee without just cause and upon refusing to afford to the employee a hearing on the propriety of his dismissal?

May Pennsylvania courts, by reference to judge made law, declare that, in the area of public employment, no property interest may vest in employees and thereby deny to the employees the procedural due process of law guaranteed to them by the Fourteenth Amendment?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Respondent in this case is a public corporation known as the Philadelphia Housing Authority (hereinafter, "Respondent"). Respondent was created pursuant to the Pennsylvania Housing Authority Law of 1935, Act of May 28, 1973, P.L. 955, 35 Purdon's Statutes §1541, et. seq., section 10 of which describes authorities created pursuant to the Act as agencies of the Commonwealth of Pennsylvania. 35 P.S. §1550.

As indicated by the Questions Presented For Review set forth above, Petitioners Claim that the Respondent, an agency of the Commonwealth of Pennsylvania, caused them to suffer a deprivation of rights under Amendment Fourteen, Section 1 of the United States Constitution, which relevantly provides that no state "shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE.

This action began on July 9, 1972, upon the filing by Petitioners of a Complaint in Assumpsit with the Court of Common Pleas of Philadelphia County(1b)[1]. In response to this Complaint, Respondent filed a demurrer in the form of Prelimi-

[1]Page references to "b" are to pages of the Appendix of this Petition.

nary Objections(14b), the means sanctioned by the Pennsylvania Rules of Civil Procedure for presenting what would be considered a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. On May 7, 1973, the Court of Common Pleas entered an Order sustaining the Preliminary Objections and dismissing the Complaint. Thereafter, and as cited above, the Pennsylvania Commonwealth Court sustained the dismissal of the Complaint by the Court of Common Pleas and the Supreme Court of Pennsylvania denied a petition seeking discretionary review. From the foregoing procedural history, it is obvious that the well-pleded averments of the Complaint must be deemed as constituting the record facts. There are no other facts. We summarize the averments of the Complaint in the following paragraphs.

Petitioners are four former employees of Respondent, who began such employment in December of 1969 or in January of 1970 (1b ¶¶1-4). On October 13, 1970, Respondent's Board of Directors adopted a Personnel Policy for a purpose expressed in that document, namely, "The establishment and administration of a merit system of personnel practices which shall treat all employees of the Philadelphia Housing Authority in a reasonable and equitable manner." (2b, ¶10). After adopting this Personnel Policy, Respondent's Board directed that that document be distributed to all of its employees. As further averred in Petitioners' Complaint, Respondent's promulgation and distribution of the Personnel Policy constituted an inducement or offer of employment under the terms of that document, which offer or inducement was accepted by each Petitioner by their continuing in Respondent's employ. Thereafter, the four Petitioners in this proceeding continued to work for Respondent pursuant to a contract of employment whose terms included all of the provisions of the Personnel Policy (2b ¶11).

Section 8 of the Personnel Policy, the contract of employment (8b, Ex."A"), constitutes an effort by Respondent's Board of Directors to afford to its employees, on a contractual basis, those types of employment protections

normally embraced by our commonly accepted notions of tenure and of due process. Thus, Section 8 of the Personnel Policy contains Respondent's promise to its employees that, after completing their "required probationary period of service", their dismissal would "be for just cause only." Further, Section 8 of the Personnel Policy assured employees that, upon their dismissal or demotion, they would be notified of the reason for dismissal "in writing" and would be given "two weeks' notice of such action." Moreover, and perhaps most fundamentally in terms of this Petition, Section 8.21 of the Personnel Policy purported to afford to dismissed employees appellate review of their dismissal, upon their request therefor within ten (10) calendar days following the effective date of a dismissal. In this respect, the Policy states that, within a reasonable period of time, the Board of Directors will "designate a panel to review the facts of the situation." All of these promises—all of these ingredients of procedural due process—were breached as to each Petitioner, as we shall now see.

On February 28, 1972, James Greenlee, Respondent's then Chairman, advised Petitioner Miles Mahoney that he was dismissed. No reason was given for this action (3b ¶12 & 5b ¶20(d)).

By identical letters dated March 22, 1972, Mr. Greenlee advised Petitioners David Gilmore, Thomas Stathis and Jon Steinberg that, as of that date, their employment with Respondent was being terminated (3b¶13, 11b, Ex."B"). Aside from the rather general statement that Mr. Greenlee felt that "top" level staff personnel" must "agree with the policies of the Board", no reason was given to any of these Petitioners for their dismissal from Respondent's employ.

Following the respective dismissals, each Petitioner, in accordance with Section 8.21 of the Personnel Policy, submitted a letter to Respondent appealing that action and requesting an immediate review (4b, ¶17). Thereafter, and on numerous occasions, Petitioners repeatedly requested Respondent, again in accordance with Section 8.21 of the Personnel Policy,

to designate a panel to review the facts involved in these dismissals and to dispose of Petitioners' appeals. Respondent, however, refused to designate or convene such a panel and the lawsuit followed (4b ¶18).

For the purposes of this Petition, the foregoing facts are material to the questions presented. Petitioners' Complaint also avers the following, relevant facts.

Each Petitioner faithfully and competently performed all duties assigned to him by Respondent. Not only has no representative of Respondent ever complained of the job performance of any of the Petitioners, but, to the contrary, each Petitioner has received a series of commendations from his superiors concerning his performance as an employee. Accordingly, and even aside from the violations of Section 8 of the Personnel Policy specified above, that document was violated by Respondent as to each Petitioner for the fundamental reason that there was no "just cause" for the dismissal of any of them (5b, ¶¶19 & 20). As a result of their dismissals by Respondent, each Petitioner has suffered substantial money damages, judgment for which is sought in this action.

On the basis of the foregoing facts, the Pennsylvania courts sustained Respondent's demurrer and dismissed the Complaint. Let us now examine the Pennsylvania courts' stated reasons for this action, in the course of which examination we shall see how the constitutional question that pervades this case was raised and passed upon below.

The rationale for the decision below was founded upon the 1960 decision of the Pennsylvania Supreme Court in *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A.2d 278 (1960). *Scott* represents perhaps the most complete expression of Pennsylvania common law with respect to contracts governing public employment. Most simply put, in *Scott*, the Pennsylvania Supreme Court held that employment contracts in the public service, to the extent they prevent the public employer from dismissing an employee at will, are void as contra some alleged public policy. The following paragraphs of the Commonwealth Court of Pennsylvania's Opinion in this case constitute a fair summary of the holding in *Scott*:

> "In *Scott* it was held that public authorities have no power, unless conferred by statute, to enter into contracts of employment which prevent such authorities from dismissing employees at will. The *Scott* decision is precisely on point and controls here.
>
> "The *Scott* court stated that 'tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis, is, where it exists, a matter of legislative grace' . . . 166 A.2d at 281, and 'where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating', . . . 166 A.2d at 281." (21b-22b)

With the foregoing as its stated premise, the Commonwealth Court then examined the Pennsylvania Housing Authority law and held, correctly, that that statute "discloses that this act contains no legislative expression that Housing Authorities have the power to create tenure by contract, expressed or implied." And, finally, the Court concluded that, "absent the existence of such specific legislative authority, employees of public authorities cannot maintain actions in assumpsit based on a breach of an alleged employment contract with a public authority [Citing, once again, *Scott v. Philadelphia Parking Authority*]." (22b)

On June 29, 1972, ten days before the Complaint in this case was filed, this Court decided the companion cases of *Board of Regents v. Roth*, 408 U.S. 564, and *Perry v. Sindermann*, 408 U.S. 593. The view of the Fourteenth Amendment expressed by this Court in the decisions in these cases is the legal premise upon which this Petition is based. Accordingly, in our Argument we shall discuss these decisions and their applicability to the facts here involved at some length. It will be noted, however, that Petitioners' Complaint in the Philadelphia Common Pleas Court was not expressly based on allegations that Respondent had violated the Fourteenth Amendment in dismissing Petitioners from employment. To the contrary (and since *Roth* and *Sindermann* had so recently been

decided and had not yet been unearthed by counsel), the Complaint limited its claim to that of Respondent's breach of contract, i.e., Respondent's refusal to abide by the various promises set forth at Section 8.2l of the Personnel Policy.

The applicability of the *Roth* and *Sindermann* decisions — the federal, constitutional question involved here — was first raised by Petitioners in their brief contra respondent's preliminary objections. The Philadelphia Common Pleas Court, of course, relying on *Scott v. Philadelphia Parking Authority*, held that *Roth* and *Sindermann* were "inapposite to the matter at hand." (19b). In their brief to the Pennsylvania Commonwealth Court, Petitioners, once again, heavily relied on *Board of Regents v. Roth* and *Perry v. Sindermann* in support of their urging a reversal of the Philadelphia Court of Common Pleas. Once again, the Commonwealth Court held against Petitioners on the federal question raised with respect to the applicability of *Roth* and *Sindermann*. As we shall see more fully below, the Commonwealth Court reasoned that Petitioners were not entitled to procedural due process prior to their dismissals by reason of the fact that the Pennsylvania Supreme Court decision in *Scott* precluded Petitioners' claim that they were vested in a "property interest" in and to their employment. The portion of the Commonwealth Court Opinion so holding may be found at page 23b of the Appendix to this Petition. In any event, the federal question of the applicability of the Fourteenth Amendment was timely and properly raised before all of the lower courts and, accordingly, this Court undoubtedly has jurisdiction to review the judgments below on Writ of Certiorari.

ARGUMENT.

The decisions of this Court in *Roth* and in *Perry v. Sindermann* are the latest in a line of decisions treating of the special relationship that results when a state becomes an employer. Thus, and unless inhibited by statute or contract, a private employer can condition employment on any ground he chooses. Obviously, however, a state, because it is a state and is subject to the First and Fourteenth Amendments, does not have such freedom. Accordingly, for the past several decades, this Court has had occasion to affirm and reaffirm the principle that public employment may not be conditioned on a basis that tends to inhibit constitutionally protected speech or association. From *United Public Workers v. Mitchell*, 330 U.S. 75, through *Pickering v. Board of Education*, 391 U.S. 563, this Court has asserted and reasserted that a state employee may not be deemed to have surrendered constitutionally protected liberty by assuming such employment. In *Board of Regents v. Roth* and in *Perry v. Sindermann*, this Court went a step further in affording constitutional protection to citizens who accept state employment.

In *Roth* and in *Perry v. Sindermann*, this Court interpreted the Fourteenth Amendment as prohibiting a state from dismissing an employee whose right to employment rose to the level of a property interest without first affording to such an employee the minimal ingredients of procedural due process, viz., notice of charges and an opportunity to be heard. And, when consideration is given to *Perry v. Sindermann* in light of the record in this case, it becomes readily apparent that, in this case, Respondent's failure to convene a hearing to consider Petitioners' appeal from their dismissal by Respondent constituted a clear violation of the Fourteenth Amendment. Indeed, and as we shall now see, this conclusion follows rather more obviously from the record in this case than it did from the facts *sub judice* in *Perry v. Sindermann*.

Perry v. Sindermann involved the refusal by the Board of Regents and the president of a state college to renew a

teacher's employment contract. The teacher involved, Robert Sindermann, had publicly advocated a change in the college program that was opposed by the administration and, in addition, had been publicly critical of the Regents. Sindermann's complaint alleged that, because of his public stance, the defendants refused to renew his contract. The legal theories of his claim were twofold, namely, (i) defendants' decision not to rehire him infringed his right to free speech and (ii) defendants' failure to afford him the opportunity for a pretermination hearing constituted state action violative of his right to procedural due process under the Fourteenth Amendment. The lower court granted summary judgment for the defendants, the college administration. The Court of Appeals reversed and this Court unanimously affirmed the Court of Appeals.

In the opinion by Justice Stewart, this Court held that Sindermann was correct as to both the theories on which his complaint was grounded. Thus, the Court held that the pleadings raised a triable issue on whether the defendants' refusal to renew Mr. Sindermann's teaching contract was motivated by Sindermann's exercise of protected speech. In addition, and more significantly for present purposes, the Court also held that, since Mr. Sindermann had a "property" interest in his job, his contract could not be renewed without first affording to him the "right to a statement of reasons and a hearing before college officials upon their decision not to retain him", those being the minimal ingredients of procedural due process (*Sindermann*, 33 L.Ed. 2d, at p. 579). It is this portion of this Court's opinion in *Sindermann* that has been flouted by the Pennsylvania courts in this case.

In the *Sindermann* case, the defense contended that, since Sindermann lacked "tenure" in his contractual relationship with the state college system, his job rights did not rise to the level of a "property interest" and that, accordingly, the Fourteenth Amendment did not preclude defendants from extinguishing whatever interest he had in his job without affording to him procedural due process. And, indeed, Sindermann did not have "tenure". What Sindermann did have, at least as alleged

in his complaint, was *de facto* recognition by the college that the notion of tenure was to govern employment at the college. Thus, the college's faculty guide contained a statement that, while the college had no tenure system, each faculty member was encouraged, "to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work." This Court held that, despite the vagueness of this "promise", employment in reliance on it created in the promisee an "objective expectancy of continued employment" that rose to the level of a "property interest"—an interest which entitled Mr. Sindermann to procedural due process prior to what amounted to a dismissal from employment by the college administration. Obviously, in this case the Petitioners have averred in their Complaint facts that more assuredly establish their "property interest" in their employment with Respondent than Mr. Sindermann was able to allege in his complaint. As we have seen, Petitioners' employment with Respondent was governed by a written contract that unequivocally promised to all of Respondent's employees that they would only be dismissed "for just cause", that they would receive two weeks' written notice of their dismissal and that they would be given, upon their request, appellate rights with respect to their dismissal before a panel convened by Respondent's governing Board. Clearly, if the indefinite contractual relationship Mr. Sindermann had with the college administration in his case gave him a "property interest" in his job, the definite, written undertakings by Respondent in this case gave Petitioners "property interests" in their jobs and thereby, under the Fourteenth Amendment, precluded dismissal absent pre-dismissal procedural due process.[2]

[2]Decisions by various Courts of Appeals subsequent to *Perry v. Sindermann* further demonstrate that Petitioners' dismissals from employment by Respondent constituted Respondent's violation of the Fourteenth Amendment. See, for instance, *Hostrop v. Board of Junior College*, 471 F.2d 488

And yet, despite the foregoing considerations, the Pennsylvania state courts sustained Respondent's demurrer to the Complaint — a Complaint alleging facts that established Petitioners' "property interest" in their employment and Respondent's refusal, despite this interest, to afford Petitioners a hearing on the question of the propriety of their dismissal. Obviously, under such circumstances, it must be concluded that, in the words of Rule 19(1) (a) of this Court, the Pennsylvania courts have decided a federal question "in a way probably not in accord with applicable decisions of this Court." As we shall now see, however, the Pennsylvania courts have done something worse than this. In effect, the Pennsylvania courts have ruled that the Fourteenth Amendment is not applicable in Pennsylvania when the state, acting as an employer, decides to deprive citizen-employees of property interests in that employment. In short, by virtue of the Pennsylvania state court decisions at issue here, *Perry v. Sindermann* has no applicability in Pennsylvania. Let us see how the Pennsylvania state court system has reached such an alarming conclusion.

The Pennsylvania Commonwealth Court returned to *Scott v. Philadelphia Parking Authority*, supra, for the premise of its decision that, despite *Perry v. Sindermann*, Petitioners' Complaint failed to state a claim upon which relief could be granted. As we have seen above, in *Scott*, the Pennsylvania Supreme Court held, that, unless sanctioned by statute, employment contracts that inhibit public employers from dismissing an employee at will are void as against public policy. Obviously, the Pennsylvania Supreme Court holding in *Scott* is sharply at odds with the decision of this Court in *Perry v. Sindermann*. However, based on some language found in Justice Stewart's opinion in *Board of Regents v. Roth*, the Pennsylvania Commonwealth Court clouded the clear opposition between *Scott* and *Perry v. Sindermann*.

Footnote 2 (continued)

(7th Cir., 1972); *Johnson v. Fraley*, 470 F.2d 179 (4th Cir., 1972); *Skehan v. Board of Trustees*, (U.S. Court of Appeals for the Third Circuit, No. 73-1613, slip opinion filed May 3, 1974).

In *Board of Regents v. Roth*, Mr. Justice Stewart observed, at 408 U.S. 577, that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Based on the proposition that property interests "stem from . . . state law", the Pennsylvania Commonwealth Court concluded in this case that, since Pennsylvania state law is as expressed in *Scott v. Philadelphia Parking Authority*, "we must conclude that Board of Regents v. Roth, supra, and Perry v. Sindermann, supra, are not applicable here." Put differently, the Supreme Court of Pennsylvania has affirmed a decision in this case by which it has been determined that, in the Commonwealth of Pennsylvania, property interests cannot arise in and to employment in the public service and, therefore, Fourteenth Amendment protections with respect to such interests are not applicable in this state.

From the foregoing, it would appear fairly obvious that the State Court decisions in this case run counter to the Fourteenth Amendment as interpreted by this Court in *Perry v. Sindermann*. We would suggest that, even though the property interests protected by the Fourteenth Amendment may stem from state law, a state is not free to define property interests out of existence and thereby immunize itself from the strictures of, and deprive its citizens from the benefit of, the due process of law purportedly preserved to all state citizens by the Fourteenth Amendment. In this case, the Commonwealth of Pennsylvania has defined the property interests in public employment in such a way as renders inoperative in the area of public employment the Fourteenth Amendment's promise of due process. In tomorrow's case, a state court could define a landowner's interest in his real estate in such a way as to prevent that interest from rising to the level of a "property interest" and thereby enable the state to exercise its rights of eminent domain without affording to the landowner procedural

due process. In short, what the Pennsylvania State Courts have done in this case has made a mockery of the constitutional principles propounded in *Perry v. Sindermann*.

Moreover, by holding that property interests cannot arise in public employment in Pennsylvania, the lower courts in this case have denigrated beyond the pale of constitutional protection a right and liberty heretofore considered basic to a free citizenry. In *Truax v. Raich*, 293 U.S. 33, 36 S.Ct 7 (1915), this Court stated that, "The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law." Following from this, the Court concluded that,

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

A few years later, in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923), the Court further expatiated on the liberty guaranteed by the Fourteenth Amendment, as follows:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized in common law as essential to the ordinary pursuits of happiness by free men."

Now, if the right to contract for employment is, as it would appear to be, "essential to the orderly pursuit of happiness by free men" and if the "right to work for a living in the common

occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure", it would appear fairly plain that a state court's holding that no property interest can arise in public employment raises serious constitutional questions, which run even deeper than that of procedural due process. What the Pennsylvania Courts have done in this case raises, we respectfully submit, a fundamental issue of substantive due process. For, if a state can define property interests in common dealings with the state as to be non-existent, procedural due process is a meaningless phrase and the property interests of all citizens are rendered subject to arbitrary and unreasonable governmental action.[3]

CONCLUSION.

For all the foregoing reasons, Petitioners respectfully submit that this Court should issue a Writ of Certiorari to the Philadelphia Court of Common Pleas (where the record in this case is now lodged) and should thereafter reverse the decisions of the Pennsylvania lower courts reproduced in the Appendix to this Petition.

Respectfully submitted.

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Attorneys for Petitioners

[3]Justice Marshall, in his dissent in *Board of Regents v. Roth*, referred to many of the considerations expressed above. As part of his dissent, Mr. Justice Marshall expressed the view that the Fourteenth Amendment establishes a "property" right of every citizen to public employment "unless the government can establish some reason for denying the employment." (408 U.S. 588.) While we agree with this view, it is not necessary for the Court to adopt this view in a decision reversing the state action challenged by this Petition. In short, Mr. Justice Marshall, in describing the interests and liberties protected by the Fourteenth Amendment, goes further than it is necessary for this Court to go in this case.

Appendix.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

MILES MAHONEY, DAVID GILMORE, THOMAS STATHIS AND JON STEINBERG,	:	Term, 1972
Plaintiffs,	:	
vs.	:	
PHILADELPHIA HOUSING AUTHORITY	:	No.

COMPLAINT IN ASSUMPSIT

1. MILES MAHONEY is a citizen of the City of Philadelphia. He resides at 5119 Pulaski Avenue.

2. DAVID GILMORE is a citizen of the City of Philadelphia. He resides at 5121 Pulaski Avenue.

3. THOMAS STATHIS is a citizen of the City of Philadelphia. He resides at 707 Pine Street.

4. JON STEINBERG is a citizen of the City of Philadelphia. He resides at 5021 Copley Road.

5. The PHILADELPHIA HOUSING AUTHORITY (hereinafter, "PHA") is a public corporation and an agency of the Commonwealth of Pennsylvania created pursuant to the Pennsylvania Housing Authority Law of 1935, Act of May 28, 1937, P.L. 955, 35 P.S. 1541, et seq.

6. On December 8, 1969, pursuant to what was then a verbal contract of employment, MILES MAHONEY became employed by PHA as Deputy Executive Director and served PHA in that capacity until his dismissal or discharge, which occurred on February 28, 1972.

7. On January 5, 1970, pursuant to what was then a verbal contract of employment, DAVID GILMORE became employed by PHA as Tenant Services Officer. On June 5, 1971, DAVID GILMORE was promoted by PHA to the job of Acting Director of Social Services and served PHA in that capacity until his dismissal or discharge, which occurred on March 22, 1972.

8. On January 5, 1970, pursuant to what was then a verbal contract of employment, THOMAS STATHIS became employed by PHA as Assistant Personnel Director. On December 6, 1971, THOMAS STATHIS was promoted by PHA to the position of Personnel Director and served in that capacity until his dismissal or discharge, which occurred on March 22, 1972.

9. On January 5, 1970, pursuant to what was then a verbal contract of employment, JON STEINBERG became employed by PHA as Chief of Admissions and Occupancy. On November 3, 1970, JON STEINBERG was promoted by PHA to the position of Director of Management for Scattered Sites and served PHA in that capacity until his dismissal or discharge, which occurred on March 22, 1972.

10. On October 13, 1970, the Board of Directors of PHA adopted a Personnel Policy for the express purpose of "the establishment and administration of a merit system or personnel practices which shall treat all employees of the Philadelphia Housing Authority in a reasonable and equitable manner." Section 8 of this Personnel Policy, a true and correct copy of which is attached hereto as Exhibit "A", states, among other things, that any employee of the Authority who has completed a "required probationary period of service" may be dismissed "for just cause only". Section 8.1 of the Personnel Policy further states that the Personnel Department of PHA "shall notify the employees of the reason of the dismissal or demotion in writing and shall give the employee two weeks' notice of such action".

11. Following the promulgation of the Personnel Policy referred to in Paragraph 10 above by the Board of Directors of PHA, the Board of Directors caused said Personnel Policy to

be distributed among all PHA employees. The Board's promulgation and distribution of the Personnel Policy constituted an inducement for employment or offer of employment under the terms of said policy which was accepted by each plaintiff and by all other PHA employees by their continuing in PHA's employ. Accordingly, by continuing to work for PHA subsequent to the promulgation of the Personnel Policy, plaintiffs' contract of employment included all of the terms and conditions of the Personnel Policy as an integral part thereof.

12. On February 28, 1972, JAMES GREENLEE, who was, at all times here relevant, the Chairman of PHA, advised the plaintiff, MILES MAHONEY, that, as of that date, MILES MAHONEY's employment with PHA was being terminated.

13. By identical letters dated March 22, 1972, JAMES GREENLEE advised the plaintiffs, DAVID GILMORE, THOMAS STATHIS and JON STEINBERG, that, effective that date, their employment with PHA was being terminated. A true and correct copy of the letter dated March 22, 1972 from Mr. Greenlee to DAVID GILMORE is attached hereto as Exhibit "B" and is hereby made part hereof.

14. In violation of Section 8.1 of the Personnel Policy, on and following February 28, 1972, no member, agent or employee of PHA and no representative of PHA's Personnel Department advised plaintiff MILES MAHONEY of the reason for his dismissal. In addition, plaintiff MILES MAHONEY was not given the two week notice of dismissal referred to in the second paragraph of Section 8.1 of the Personnel Policy.

15. Although the second paragraph of each letter dated March 22, 1972 to the plaintiffs, DAVID GILMORE, THOMAS STATHIS and JON STEINBERG, purports to state the reason for the dismissal or termination of employment of each of the said plaintiffs, said paragraph contains untrue averments and, accordingly, does not set forth a valid basis for the dismissal or termination of employment of the said plaintiffs. In addition, neither DAVID GILMORE, THOMAS STATHIS or JON STEINBERG was af-

forded the two week notice of dismissal referred to in the second paragraph of Section 8.1 of the Personnel Policy.

16. By letter dated March 6, 1972, a true and correct copy of which is attached hereto as Exhibit "C", the plaintiff, MILES MAHONEY, pursuant to Section 8.2 of the Personnel Policy, appealed his dismissal from PHA.

17. By identical letters mailed to and received by PHA, the plaintiffs, DAVID GILMORE, THOMAS STATHIS and JON STEINBERG, pursuant to Section 8.2 of the Personnel Policy, appealed their respective dismissals from PHA. Attached hereto as Exhibit "D" and hereby made part hereof is a true and correct copy of the letter appealing his dismissal mailed by DAVID GILMORE. The letters mailed by THOMAS STATHIS and JON STEINBERG were identical with the letter mailed by DAVID GILMORE except that the letter of the plaintiff STEINBERG was dated March 23, 1972 and with further exception that each of the said letters referred to the actual position each of these plaintiffs held with PHA prior to their dismissals.

18. On numerous occasions following the submission by each plaintiff of their letters appealing their respective dismissals from PHA, plaintiffs, through their attorney, have requested defendant, in accordance with Section 8.21 of the Personnel Policy, to designate a panel to review the facts involving the dismissals and to dispose of plaintiffs' appeals. Despite these repeated requests, and despite the expiration of "a reasonable period of time" following the submission of each appeal (see second paragraph of Section 8.21 of the Personnel Policy) and despite the further fact that JAMES GREENLEE and PHA's attorney have each acknowledged PHA's obligation to designate a panel for the purpose of disposing of these appeals, defendant has failed to designate such a panel and has thus violated the Personnel Policy. In addition, said failure by defendant has made it impossible for plaintiffs, despite their repeated efforts, to exhaust the contractual remedies given to employees of PHA upon their dismissal under the provisions of the Personnel Policy.

19. During the entire period of their respective employment with PHA, each plaintiff faithfully and competently performed all duties assigned to him by PHA. No representative of PHA ever complained of the job performance as an employee of any of the plaintiffs in this action. To the contrary, each plaintiff has received several commendations from his superiors at PHA in respect of his job performance.

20. The dismissal or termination of employment of each plaintiff from PHA was invalid under their respective contracts of employment with PHA and, more particularly, under the Personnel Policy, in the following respects:

(a) There was no "just cause" for the dismissal of each plaintiff, which occurred, in each case, after the completion of his probationary period of service;

(b) No plaintiff received two weeks' notice of dismissal;

(c) No plaintiff was afforded, following his dismissal, the appellate rights specified at Section 8.21 of the Personnel Policy;

(d) The plaintiff, MILES MAHONEY, was given no notice in writing of the reason for his dismissal.

21. On May 5, 1972, plaintiffs filed a Complaint in Equity against PHA and the members of the Board of Directors of PHA in which equitable relief was sought by plaintiffs for injuries and losses incurred by each of them as a result of PHA's wrongful dismissal or termination of employment of each plaintiff. On May 30, 1972, the Court of Common Pleas of Philadelphia County, per the Honorable Ned L. Hirsh, entered an Order sustaining defendants' Preliminary Objections to plaintiffs' Complaint in Equity, denying plaintiff's prayer for equitable relief and certifying the matter to the law side of the Court. The entire record of the aforesaid equity action, which was filed at May Term, 1972, No. 1163, is incorporated herein by reference pursuant to Rule 1019 of the Pa. R.C.P.

22. Following his wrongful dismissal from employment by PHA, plaintiff, MILES MAHONEY, despite repeated efforts, was unable to obtain re-employment until May 5, 1972. During the period from February 28, 1972, the date of his dismissal from PHA, until May 5, 1972, the date he obtained new employment, plaintiff, MILES MAHONEY, suffered, as a result of his wrongful dismissal, a loss in the salary he would have earned at PHA during his period of unemployment in the total sum of $3,979.89.

23. Following his wrongful dismissal from employment by PHA, plaintiff, DAVID GILMORE, despite repeated efforts, was unable to obtain re-employment until June 5, 1972. During the period from February 28, 1972, the date of his dismissal from PHA, until June 5, 1972, the date he obtained new employment, plaintiff, DAVID GILMORE, suffered, as a result of his wrongful dismissal, a loss in the salary he would have earned at PHA during his period of unemployment in the total sum of $3,050.87.

24. Following his wrongful dismissal from employment by PHA, plaintiff, THOMAS STATHIS, despite repeated efforts, has been unable to obtain re-employment. During the period from February 28, 1972, the date of his dismissal from PHA, until June 30, 1972, plaintiff, THOMAS STATHIS, suffered, as a result of his wrongful dismissal, a loss in the salary he would have earned at PHA during his period of unemployment in the total sum of $3,568.69.

25. Following his wrongful dismissal from employment by PHA, plaintiff, JON STEINBERG, despite repeated efforts, was unable to obtain re-employment until May 5, 1972. During the period from February 28, 1972, the date of his dismissal from PHA, until May 5, 1972, the date he obtained new employment, plaintiff, JON STEINBERG, suffered, as a result of his wrongful dismissal, a loss in the salary he would have earned at PHA during his period of unemployment in the total sum of $3,952.10.

WHEREFORE, plaintiffs pray the Court to enter judgment in favor of plaintiffs and against defendant in the total sum of

$14,551.55, as aforesaid, plus such other sums to which the plaintiff, THOMAS STATHIS, may be entitled to the date of judgment, together with interest thereon and costs.

PECHNER, SACKS, DOREMAN, ROSEN & RICHARDSON

By: _____

MICHAEL BRODIE
Attorneys for Plaintiffs

Exhibit "A"

Section 8—DISMISSALS, DEMOTIONS, SUSPENSIONS, AND APPEALS

8.1 *Dismissal, Demotion, and Suspension*

Any dismissal or demotion after the completion of the required probationary period of service, or suspension of any employee shall be for just cause only.

The Personnel Department shall notify the employee of the reason for dismissal or demotion in writing and shall give the employee two weeks notice of such action.

8.11 *Dismissal*

In cases of dismissal for disciplinary reasons, an employee may be suspended without pay during the two week notice period required for dismissal.

8.12 *Demotion*

An employee may be demoted for disciplinary reasons or because the performance of his duties falls below the required standards. The demotion shall include a reduction in pay to the pay range of the lower classification.

8.121 *Voluntary Demotion*

An employee may elect to demote to a lower position if one is available and if he possesses the required qualifications to avoid layoff.

8.13 *Suspension*

An employer may suspend an employee without pay from his position at any time for just cause. Notice of suspension and the reason shall be given to the employee in writing. Each suspension without pay shall not exceed 30 calendar days.

8.2 *Appeals*

Union category employees who have completed their required probationary period may appeal the actions of dismissal, demotion, or suspension through the grievance procedure specified in the Union Agreement.

Administrative, technical and clerical employees will follow the following appeal procedure.

8.21 *Dismissal*

Within 10 calendar days following the effective date of dismissal, a permanent employee who has satisfactorily completed the required probationary period may appeal the dismissal by requesting a review of the action by the Board of Directors of the Housing Authority. Such a request for review must be in writing with a copy sent to the Personnel Director.

The Board of Directors will, within a reasonable period of time, designate a panel to review the facts of the situation. The employee will be able to present evidence and may be represented by counsel, if he so chooses.

The members of the panel will present in writing to the Board their recommendations to either sustain or deny the appeal, and whether to reinstate the employee with or without loss of pay for the period of his suspension.

The Chairman of the Board of Directors will then notify the employee the results of his appeal action in writing.

8.22 *Demotion*

Within 10 days following the effective date of demotion, a permanent employee who has satisfactorily completed the required probationary period may request in writing to the Executive Director a

review of the action for demotion. The Executive Director shall review all pertinent information concerning the action and notify the employee of his decision on the appeal action within a reasonable period of time.

8.23 *Suspension*
Within 10 days following the effective date of the suspension period, a permanent employee who has satisfactorily completed the required probationary period and who has been suspended for more than ten (10) consecutive working days, may request in writing to the Executive Director a review of the suspension action. The Executive Director shall review all pertinent information and notify the employee of his decision on the appeal action within a reasonable period of time.

Exhibit "B"

THE PHILADELPHIA HOUSING AUTHORITY
2012-18 CHESTNUT STREET PHILADELPHIA, PENNSYLVANIA 19103 (215) 564-5250

James W. Greenlee
Chairman

Mrs. Douglass Kee
Mrs. LeRoy Larner
James A. Nolen, Jr.
William L. Rafsky

Richard Tucker
Deputy Executive Director

March 22, 1972

Mr. David I. Gilmore
5121 Pulaski Avenue
Philadelphia, Pennsylvania 19144

Dear Mr. Gilmore:

In accordance with the powers given to me by the Board of the Authority today, I am terminating your employment with the Philadelphia Housing Authority effective today.

This action is being taken because it is my feeling that, in order for this Authority to be effective, it is necessary that the top level staff personnel agree with the policies of the Board and be willing to implement those policies. Your actions at the last Board Meeting of this Authority clearly demonstrated your unwillingness to implement Board decisions.

Sincerely,

James W. Greenlee
Chairman

DEVELOPMENT DIVISION: 1503-05 WALNUT STREET PHILADELPHIA, PENNSYLVANIA 19102 (215) 665-1630

Exhibit "C"

5119 Pulaski Avenue
Philadelphia, Penna.
March 6, 1972

Board Members
Philadelphia Housing Authority
Attention: James W. Greenlee, Esq.
Chairman

Dear Mr. Greenlee:

Pursuant to Section 8.21 of the Personnel Policy of the Authority, I hereby appeal my apparent dismissal from the post of Deputy Executive Director of Operations and request an immediate review of the action by the Board of Directors.

Very truly yours,

Miles Mahoney

cc: Mrs. Frostena Kee
Mrs. Carmelita Larner
Mr. William Rafsky
Mr. James A. Nolan
Mr. Thomas Stathis,
Personnel Director

Exhibit "D"

March 22, 1972

Board Members
Philadelphia Housing Authority
Att: James W. Greenlee, Esq.
Chairman

Dear Mr. Greenlee:

Pursuant to Section 8.21 of the Personnel Policy of the Authority, I hereby appeal my dismissal from the post of Acting Director of Social Services and request an immediate review of the action by the Board of Directors.

Sincerely yours,

David Gilmore
5121 Pulaski Avenue
Phila., Pa.

cc. Mrs. Frostena Kee
Mrs. Carmelita Larner
Mr. William Rafsky
Mr. James A. Nolan
Personnel Department

14b

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

MILES MAHONEY, DAVID GILMORE, THOMAS STATHIS AND JON STEINBERG, *Plaintiffs,*	:	July Term, 1972
VS.	:	
PHILADELPHIA HOUSING AUTHORITY	:	No. 2648

DEFENDANT'S PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT IN ASSUMPSIT

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The defendant, The Philadelphia Housing Authority, by its counsel, Harold Cramer, Esquire, comes and files these preliminary objections to plaintiffs' Complaint and assigns in support thereof the following reason:

1. Plaintiffs fail to state a cause of action against defendant Philadelphia Housing Authority.

WHEREFORE, defendant demands that the Complaint against it be dismissed.

HAROLD CRAMER, *Esquire*
Attorney for Defendant

IN THE
COURT OF COMMON PLEAS OPINION

July Term 1972 **No. 2648**

MILES MAHONEY, DAVID GILMORE
THOMAS STATHIS AND

JON STEINBERG

vs

PHILADELPHIA HOUSING AUTHORITY

MEMORANDUM OPINION

Plaintiffs in this action are four former executive employees of the defendant, Philadelphia Housing Authority (herein after referred to as "PHA"). All four plaintiffs had entered into the employ of defendant without any written understanding or agreement as to the terms of their employment. Subsequently, defendant's Board of Directors adopted a personnel policy dealing with "the establishment and administration of a merit system or personnel practices which shall treat all employees of the Philadelphia Housing Authority in a reasonable and equitable manner." Essentially, the disputed section of this "personnel policy" provides that dismissals shall be given for cause, upon two weeks prior notice given reasons for the action, and that administrative personnel may appeal dismissals to a panel designated by defendant's Board of Directors. Subsequently, all four plaintiffs were dismissed from defendant's employ without compliance with the procedures mandated in the personnel policy.

Plaintiffs responded by bringing an action in equity against PHA requesting this Court to grant an injunction directing their reinstatement. On May 30, 1972, this Court entered an Order sustaining Defendant's Preliminary Objections to Plaintiffs' complaint and certifying the matter to the law aide of the Court.

Plaintiffs then brought this action in assumpsit claiming that the above-mentioned "Personnel Policy" created an implied contract of employment between plaintiffs and defendant which denies defendant the right to summarily dismiss plaintiffs from their positions as executive employees. Plaintiffs allege that defendant has breached this policy by not complying with the "Cause" provisions, not giving proper notice, and not providing a panel to hear plaintiffs' appeals.

Plaintiffs have further requested damages in amounts equal to the sums which plaintiffs allege they would have earned had their employment with defendant not been terminated.

Once again, defendant brings preliminary objections to the Complaint averring that a cause of action has not been stated.

The sole issue to be determined, then, is whether plaintiffs have a cause of action at law for damages against defendant PHA.

Plaintiffs essentially argue that when they continued working after the promulgation and distribution of the personnel policy, an implied contract resulted. We need not decide whether a contract results as a matter of law from these facts since we find that defendant did not have the capacity to enter into any type of employment contract with plaintiffs.

It has been held that public authorities, such as PHA, have no power, unless conferred by statute, to enter into contracts of employment, particularly with executive employees, which prevent such authorities from dismissing such employees at will. *Scott vs Philadelphia Parking Authority*, 402 Pa. 151 (1960)

The decision of the Pennyslvania Supreme Court in *Scott* is precisely on point, and controls this case. In *Scott*, an

employee of Philadelphia Parking Authority, a public authority, brought an action in assumpsit to recover monies allegedly due under a written employment contract. The court, in an opinion by Mr. Justice Cohen, found the contract to be unauthorized since, "tenure in public employment, in the sense of having a claim to employment which precludes dismissal on a summary basis" can exist only as a matter of legislative grace. *Id.* at 154. The opinion concluded by stating that "where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating." *Id.* at 155. Since the Court found that no specific legislative authority existed, it determined that the alleged contract was unauthorized, that the plaintiff in *Scott* could only be an employee at will, and that he could not maintain an action in assumpsit on the basis of the breach of an alleged employment contract with a public authority. The only exception to this rule, as set out by the Pennsylvania Supreme Court, is tenure conferred as an integral part of a comprehensive governmental employment scheme, such as the Civil Service Act or the Teacher Tenure Act.

Clearly, there is no such scheme contemplated in the Housing Authorities Law, Act of May 28, 1973, P.L. 955, 45 P.S. §1541 et. seq., under which defendant was created. PHA is clearly a public authority which brings it directly under the rule as set forth in *Scott*, supra.

Plaintiffs seek to distinguish *Scott* on the theory that whereas the plaintiff in *Scott* asserted a breach of contract theory based on a violation of "tenure rights", plaintiffs, here, assert a breach of the "personnel policy" because they were dismissed without cause, notice, or appellate rights.

Although an arduous attempt has been made by this Court to recognize the distinction plaintiffs opt for, we must confess we don't find plaintiffs' argument analytically pleasing when reduced to essentials. Like the *Scott* plaintiff, the instant plaintiffs would also seem to be seeking tenure—a tenure subject to defendant giving cause, notice and appellate rights. That *Scott* is directly controlling on the present facts seems crystal clear to this Court.

Plaintiffs, evidently anticipating that the above argument would be cut at the jugular, further argue that, in any event, *Scott* is no longer good law since the Public Employee Relations Act of 1970, 43 P.S. § 1101.101, supersedes the *Scott* determination.

Plaintiffs' protestations, notwithstanding, it seems to us that *Scott* is still a sound expression of the present state of the law. Plaintiffs overlook the fact that in the recent Pennsylvania Supreme Court decision of *American Federation of State, County and Municipal Employees vs Shapp*, 443 Pa. 527 (1971), the Pennsylvania Supreme Court per Chief Justice Bell (who had dissented in the Scott case) partially relied on *Scott* in affirming Governor Shapp's authority to hire and fire at will all state employees who are neither constitutionally nor statutorily protected. It is clear, therefore, that the decision of the Pennsylvania Supreme Court in *Scott* is still the law of this Commonwealth and, as such, clearly binds us in the determination of these facts.

Plaintiffs present several additionai arguments which, though spirited, seem wholly without substance. Plaintiffs inform us, in their moving papers, that when this Court certified the equity action to the law side of the Court, we, in effect, inferentially held that a Complaint there would state a valid claim upon which relief could be granted. To the extent plaintiffs assert the above, we believe they grossly misapprehend the nature of equitable jurisdiction. We transferred the matter to the law side of the Court becuase plaintiffs sought money damages. By so transferring, we inferred not that there was law court jurisdiction but merely that there was no equity jurisdiction.

Plaintiffs also make an attempt at an estoppel argument but this Court finds it hard to pin down exactly what detriment, if any, was suffered by them because of assurances of appellate rights by defendant's chairman and counsel.

Finally, plaintiffs argue that a dismissal on a summary basis in public employment is prohibited by the due process clause of the 14th Amendment if the employee has an expec-

tancy of continued employment. Plaintiffs cite the cases of *Board of Regents of State Colleges vs Roth*, 408 U.S. 564, 92 S.Ct. 270L, 33 L.Ed. 2d 543 (1972) and *Perry vs Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972) in support of this proposition.

In *Roth*, the Supreme Court held that where an assistant professor without tenure at a state university was informed he would not be rehired after his first academic year, he did *not* have a property interest protected by the Fourteenth Amendment sufficient to require university authorities to give him a hearing when they declined to renew his contract of employment. In no way, then, does *Roth* support plaintiffs' position.

Perry involved a teacher in a State College system who allegedly didn't have his contract renewed because of his criticism of the college administration. We think that this case, involving infringements on 1st Amendment rights to free speech, is factually inapposite to the matter at hand. Moreover, we note, once again, the instant question doesn't involve whether plaintiffs have been robbed of a legitimate claim to job tenure without due process, but rather whether PHA had the capacity to make a contract from which a right to job tenure would have flowed in the first instance.

When skimmed down to its essentials, therefore, defendant, regardless of its intentions, had no authority to promulgate a contract of employment. The decision of our State Supreme Court in *Scott*, supra, can lead to no other conclusion.

Accordingly, it is therefore

ORDERED AND DECREED that the Preliminary Objection of the defendant, Philadelphia Housing Authority, are sustained and Plaintiffs' Complaint is dismissed with prejudice.

BY THE COURT:

HIRSH

Date: 8-1-73

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 14 T. D. 1973

MILES MAHONEY, DAVID GILMORE,
THOMAS STATHIS and
JON STEINBERG
Appellants

v.

PHILADELPHIA HOUSING AUTHORITY
Appellee

BEFORE:
HONORABLE JAMES C. CRUMLISH, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE THEODORE O. ROGERS, *Judge*

Argued: April 4, 1974

OPINION BY JUDGE MENCER Filed: June 5, 1974

Plaintiffs in this assumpsit action are four former executive employees of the defendant, Philadelphia Housing Authority (PHA).[1] All four plaintiffs had entered into the employ

[1]The Philadelphia Housing Authority is a public corporation and agency of the Commonwealth of Pennsylvania which was created pursuant to Section 10 of the Housing Authorities Law, Act of May 28, 1937, P.L. 955, as amended, 35 P.S. §1550.

of defendant without any written agreement or contract as to the terms of their employment. Subsequently, the Board of Directors of PHA adopted a personnel policy dealing with "the establishment and administration of a merit system or personnel practices which shall treat all employees of the Philadelphia Housing Authority in a reasonable and equitable manner."

Essentially, as to the questions raised here, the disputed section of this "personnel policy" provided that dismissals should be given for cause, upon two weeks' prior notice stating reasons for the action, and that administrative personnel could appeal dismissals to a panel designated by the Board of Directors of PHA. Thereafter, all four plaintiffs were dismissed from the employment of PHA without compliance with the procedures mandated in the personnel policy.[2]

PHA timely filed preliminary objections, in the nature of a demurrer, to the complaint.[3] The Court of Common Pleas of Philadelphia County entered an order sustaining the preliminary objections and dismissing the complaint. This appeal followed and, on the authority of *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166 A. 2d 278 (1960), we affirm.

In *Scott* it was held that public authorities[4] have no power, unless conferred by statute, to enter into contracts of employment which prevent such authorities from dismissing employes at will. The *Scott* decision is precisely on point and controls here.

The *Scott* court stated that "[t]enure in public employment, in the sense of having a claim to employment which

[2]The complaint also avers the following which must be deemed true for purpose of passing upon the preliminary objections in the nature of a demurrer: Each plaintiff faithfully and competently performed all duties assigned to him by PHA and there was no "just cause" for the dismissal of any of them.

[3]Plaintiffs requested damages in amounts equal to the sums which plaintiffs allege they would have earned had their employment with PHA not been terminated.

[4]The PHA is a public authority. *See Mitchell v. Chester Housing Authority*, 389 Pa. 314, 132 A. 2d 873 (1957).

precludes dismissal on a summary basis, is, where it exists, a matter of legislative grace", *id.* at 154, 166 A. 2d at 281, and "where the legislature has intended that tenure should attach to public employment, it has been very explicit in so stating", *id.* at 155, 166 A. 2d at 281.

A studied examination of the Housing Authorities Law, Act of May 28, 1937, P.L. 955, 35 P.S. §1541 et seq., discloses that this Act contains no legislative expression that housing authorities have the power to create tenure by contract, expressed or implied. Absent the existence of such specific legislative authority, employes of public authorities cannot maintain actions in assumpsit based on a breach of an alleged employment contract with a public authority. *Scott v. Philadelphia Parking Authority, supra.*

The plaintiffs' main thrust is that *Scott* is no longer expressive of the valid law of this Commonwealth because of (1) the enactment of the Public Employe Relations Act, Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §1101.101 et seq., and (2) the recent decisions of the United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972), June 29, 1972

Suffice it to note that subsequent to the enactment of the Public Employe Relations Act, our Supreme Court decided *American Federation of State, County and Municipal Employees v. Shapp*, 443 Pa. 527, 280 A. 2d 375 (1971), wherein it cited *Scott v. Philadelphia Parking Authority, supra*, as authority, in support of its decision that State employes who obtained their jobs by politics have no Federal or State constitutionally protected right to their jobs. Therefore, we conclude that the holding of *Scott v. Philadelphia Parking Authority, supra*, is still acceptable authority in this Commonwealth.

Concerning the two Federal cases relied on by plaintiffs, we conclude that *Perry v. Sindermann, supra*, is inapposite since it related to a teacher in a state college system who alleged that he had not been rehired because of his criticism of the college governing board's policies and that this was an

infringement of his right of free speech under the First Amendment. Such a question is not present in the instant case. Although Sindermann also alleged that the board's failure to provide him an opportunity for a hearing violated the Fourteenth Amendment's guarantee of procedural due process, the Supreme Court held that such a right only exists where a state-employed teacher has a right to reemployment *under state law*. In the present case our state law, *Scott v. Philadelphia Parking Authority, supra*, provides no right in employes of public authorities to tenure or continued employment, they being employed only at will. Therefore, no right guaranteed by the Fourteenth Amendment to some form of prior hearing in the case of removal exists here because plaintiffs have no property interest, under Pennsylvania law, in continued employment.

Likewise, in *Board of Regents v. Roth, supra*, the Supreme Court held that "[p]roperty interests . . . are not created by the Constitution", but "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* . . ." 408 U.S. at 577 (emphasis supplied).

Since the availability of the Fourteenth Amendment right to an administrative hearing prior to discharge from a job turns in each case on the question of a property interest in the job under state law and the plaintiffs have no such property interest under the law of this Commonwealth, *Scott v. Philadelphia Parking Authority, supra*, we must conclude that *Board of Regents v. Roth, supra*, and *Perry v. Sindermann, supra*, are not applicable here.

Order affirmed.

GLENN F. MENCER

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-697.

MILES MAHONEY, DAVID GILMORE, THOMAS STATHIS and JON STEINBERG,
Petitioners,

v.

THE PHILADELPHIA HOUSING AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

HAROLD CRAMER,
1510 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorney for Respondent.

Of Counsel:
MESIROV, GELMAN, JAFFE & CRAMER.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-697.

MILES MAHONEY, DAVID GILMORE, THOMAS STATHIS AND JON STEINBERG,

Petitioners,

v.

THE PHILADELPHIA HOUSING AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENT IN OPPOSITION.

I. JURISDICTION.

The Opinion and Order of the Commonwealth Court of Pennsylvania was filed on June 5, 1974, Petitioners' Appendix, pp. 20b-23b. The Order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was entered on September 5, 1974.

As appears from the Opinion of the Commonwealth Court of Pennsylvania, and as set forth in the Statement of Jurisdiction in the Petition for a Writ of Certiorari

(Petition at 2) the only title, right, privilege or immunity specially set up or claimed by Petitioners under the Constitution, treaties or statutes of the United States is the claim of a deprivation of property without procedural due process of law. This is thus the only federal question over which this Court can have jurisdiction upon a Writ of Certiorari, 28 U. S. C. § 1257(3).

II. COUNTER-STATEMENT OF QUESTION PRESENTED.

This case deals with the very narrow issue of the application of the procedural aspects of the due process clause of the fourteenth amendment of the United States Constitution to the specific factual situation of public employees who, as a matter of admitted stated law, have no possible claim of entitlement to job tenure. No other federal issue was raised below. The question presented is, therefore, as follows:

Do appointed, executive public employees who, under admitted state law, can have no possible legitimate claim of entitlement to tenure in their public employment, have a right to a predismissal hearing and correlative notice under the fourteenth amendment to the United States Constitution?

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Pennsylvania Statutory Provisions.

The Opinion of the Commonwealth Court of Pennsylvania presented a full and complete interpretation of the Pennsylvania Housing Authorities Law, Act of May 28, 1937, P. L. 955, 35 P. S. § 1541, *et seq.*, as applied to this case, and the Supreme Court of Pennsylvania denied allowance of a further appeal. The decision of the Pennsylvania Appellate Courts, thus rendered, interpreting the Pennsylvania Statutory Law is conclusive. *Groppi v. Wisconsin*, 400 U. S. 505, 507 (1971); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959). There is therefore no Pennsylvania statutory provision at issue in this case.

IV. COUNTER-STATEMENT OF THE CASE.

A. Factual Background.

Petitioners are four former non-tenured executive employees of Respondent The Philadelphia Housing Authority ("PHA"), each of whom held high level, policy implementing positions. As set forth in the Complaint in Assumpsit, which is included in the Appendix to the Petition for a Writ of Certiorari, Miles Mahoney was Deputy Executive Director of PHA (App. at 1b), David Gilmore was Acting Director of Social Service (App. at 2b), Thomas Stathis was Personnel Director (App. at 2b), and Jon Steinberg was Director of Management for Scattered Sites (App. at 2b).

All Petitioners entered the employ of PHA, by appointment, in late 1969 or early 1970, without any written understanding or agreement as to the terms of their employment. In October, 1970, PHA created the administrative policy commonly referred to as the "Personnel Policy". Section 8 of the policy referred to "dismissals, demotions, suspensions and appeals", and stated that dismissals would be made for cause, upon two weeks prior notice, giving reasons for the action, and that certain administrative personnel could appeal dismissals to a panel designated by PHA's Board of Directors.

In early 1972, the Board of Directors of PHA, and its Chairman, determined, as a matter of policy, that certain changes should be made in high level policy-implementing personnel (see App. at 11b). In February, 1972, Miles Mahoney was dismissed from PHA's employ. In March, 1972, the other three petitioners were notified in writing of their dismissal. A copy of the letter to Petitioner David Gilmore, informing him of the termination of his employment appears in the Appendix to the Petition at page 11b. The notices to Petitioners David Gilmore, Thomas Stathis

and John Steinberg contain a full and complete statement of the policy reasons for such action.

B. Proceedings Below.

On May 5, 1972, Petitioners commenced an action in equity in the Court of Common Pleas of Philadelphia County against PHA and its Members, requesting reinstatement. On May 30, 1972, the Court of Common Pleas sustained PHA's preliminary objections, in the nature of a demurrer, denied the requested relief and certified the matter to the law side of the Court. Petitioners filed no appeal from that decision.

On July 9, 1972, Petitioners brought an action in assumpsit in the Court of Common Pleas of Philadelphia County, claiming that the "Personnel Policy" created a form of contractual relationship which granted Petitioners some claim to tenure which would preclude summary dismissal. Petitioners further contended that, as a result of this purported claim to tenure, their dismissal without a pretermination hearing constituted a deprivation of property without procedural due process of law. By Order of May 7, 1973, the Court of Common Pleas again sustained PHA's preliminary objections, in the nature of a demurrer, and held that, under Pennsylvania law, Petitioners did not have any legitimate claim of entitlement to tenure which precluded summary dismissal, and, were therefore deprived of no "property" without due process of law.

Petitioners appealed this decision to the Commonwealth Court of Pennsylvania. By Opinion and Order filed June 5, 1974, the Commonwealth Court affirmed the Order of the Court of Common Pleas. In its Opinion, the Commonwealth Court held that, under established Pennsylvania law, as most fully set forth by the Supreme Court of Pennsylvania in *Scott v. Philadelphia Parking Authority*, 402 Pa. 151, 166

A. 2d 278 (1960), appointed executive employees of public authorities could not, as a matter of law, be granted tenure which precluded summary dismissal, except by the legislature, as in the Pennsylvania Civil Service Act, Act of August 5, 1941, P. L. 752, 71 P. S. § 741.1, *et seq.*, or the Pennsylvania Teacher Tenure Act; Act of March 10, 1949, P. L. 30, Article XI, § 1121, *et seq.*, 24 P. S. § 11-1121, *et seq.* Any purported contract or agreement to the contrary was beyond the power of the public authority and void. Since, as Petitioners now admit (Petition at 7), there was no legislative grant of tenure which would apply to executive employees of PHA, Petitioners were subject to summary dismissal.

With respect to Petitioners' claim of a deprivation of property without due process of law, the Court found that, since under the well established law of Pennsylvania, Petitioners could not possibly have any legitimate claim to entitlement of job tenure, they did not have a "property" interest in job continuation under the decisions of this Court in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), and *Perry v. Sindermann*, 408 U. S. 593 (1972). The Commonwealth Court found that Petitioners were not deprived of "property" without due process of law.

Petitioners then filed, with the Supreme Court of Pennsylvania, a Petition for Allowance of Appeal from the Order of the Commonwealth Court. By Order entered September 5, 1974, the Petition for Allowance of Appeal was denied.

V. REASONS FOR DENYING A WRIT OF CERTIORARI.

A. The Decision Below Correctly Held, in Accordance With the Applicable Decisions of This Court, That Petitioners Were Not Deprived of Property Without Due Process of Law.

1. The Decisions of This Court Require That State Law Control the Determination of Whether the Interest of an Employee of a State Agency in Continued Employment and Job Tenure Is "Property" Under the Fourteenth Amendment.

In *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972), and *Perry v. Sindermann*, 408 U. S. 593 (1972), this Court held that an employee of a state agency might have a property interest in continued employment, sufficient to be protected by the procedural aspects of the due process clause of the fourteenth amendment, only if the employee could establish a "legitimate claim to entitlement of job tenure". The decisions made clear that the legitimacy of such a claim, and therefore the existence of a "property" interest, do not arise from the Constitution, but rather from state law. As this Court stated in the Opinion in *Roth*, and restated in the Opinion in *Perry:*

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. 408 U. S. at 577 and 602 n. 7.

In his concurring Opinion to *Roth* and *Perry*, Mr. Chief Justice Burger specifically emphasized the controlling position of state law in the determination of the legitimacy of any claim to job tenure and a "property" interest in job continuation, and stated:

> Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. 408 U. S. at 604.

The Chief Justice further stressed the significance of state law to the holdings of *Roth* and *Perry* by stating that if relevant state contract law were unclear, a federal court should abstain from deciding the federal constitutional question of entitlement to a hearing. At least one lower federal court has chosen to follow the Chief Justice's Opinion and abstain in a case in which state law was not sufficiently clear to determine whether the plaintiff had a legitimate claim to job tenure. *Miller v. School District No. 167, Cook County, Illinois*, 354 F. Supp. 922 (N. D. Ill. 1973).

It is admittedly the law of Pennsylvania that Petitioners cannot have any legitimate claim to entitlement to job tenure. Notwithstanding this fact, and the clear holding of this Court that such state law is determinative, Petitioners argue that the decision of the Commonwealth Court of Pennsylvania applying these doctrines is somehow contrary to the decision of this Court in *Roth*, and "flouts" the decision in *Perry*.

Apparently, this argument is based upon Petitioners' assertion that the decision in *Perry* "held" that because the plaintiff in that case had a "property" interest in his job, he could not be denied renewal of employment without prior notice and hearing. This, however, is clearly not the holding of *Perry*. As this Court specifically stated:

> [T]he respondent here has yet to show that he has been deprived of an interest that could invoke procedural due process protections. 408 U. S. at 599. See also 408 U. S. at 602 n. 7.

In fact, the decision of this Court in *Perry* remanded the case for a determination of whether, under the appli-

cable contract law of the State of Texas, Mr. Sindermann did in fact have a legitimate claim to entitlement of job tenure and thus a "property" interest protected by the due process clause of the fourteenth amendment. Notwithstanding Petitioners' assertion to the contrary, the Opinion in *Perry* made clear beyond any possible question, that state law would ultimately determine the existence of a legitimate claim of entitlement to job tenure and a "property" interest in job continuation, by stating:

> If it is the law of Texas that a teacher in the Respondent's position has no contractual or other claim to job tenure, the Respondent's claim would be defeated. 408 U. S. at 602 n. 7.

2. Under Pennsylvania Law, Petitioners Can Have No Legitimate Claim of Entitlement to Job Tenure, and No "Property" Interest in Continued Employment Under the Fourteenth Amendment.

There can be no doubt as to the applicable Pennsylvania law regarding the legitimacy of Petitioners' claim of entitlement to job tenure. The Pennsylvania Courts have, in this case, held that Petitioners, as appointed executive employees of a public authority, with no statutory grant of tenure, can, as a matter of Pennsylvania state law, have no claim to job tenure which precludes summary dismissal.

This decision by the Pennsylvania courts, interpreting Pennsylvania law, is, of course, determinative, since "the construction of state laws is the exclusive responsibility of the state courts." *Speiser v. Randall*, 357 U. S. 513, 527 n. 7 (1958), and the decision of the Pennsylvania courts as to the Pennsylvania law involved in this case is conclusive. *Independent Warehouses, Inc. v. Scheele*, 331 U. S. 70, 86-87 (1947); *Huddleston v. Dwyer*, 322 U. S. 232, 237 (1944); *Scripto v. Carson*, 362 U. S. 207, 210 (1960).

As a result, it is clear beyond question that it is the law of Pennsylvania that public employees in Petitioners' position have no contractual or other claim to job tenure. In the words of this Court in its opinion in *Perry*, Petitioners' claim must be "defeated". 408 U. S. at 602 n. 7. The decision of the Courts below is therefore correct and fully consistent with the applicable decisions of this Court.

B. This Case Involved No Issues of Denial of Liberty Without Due Process of Law or Denial of "Substantive" Due Process of Law.

1. The Claims of Denial of Liberty Without Due Process of Law and Denial of "Substantive" Due Process of Law Were Not Raised Below and Are Not Properly Before This Court.

At the conclusion of their argument, Petitioners attempt to raise the claims that they have been deprived of liberty without due process of law, and denied "substantive" due process of law. Not only are these contentions without merit, but, as the Petition itself makes clear, they were not raised below and are presented for the first time in the Petition for a Writ of Certiorari. They are, therefore, not properly before this Court.

In their jurisdictional statement in the Petition for a Writ of Certiorari, Petitioners state that, in the Pennsylvania state courts, they asserted the deprivation of a purported property interest without procedural due process of law (Petition at 2). There is no reference to any claim of a deprivation of liberty without due process of law or a denial of "substantive" due process of law. The Opinions of the Pennsylvania state courts, reproduced in Petitioners' Appendix, concern only the claim of a deprivation of alleged property without due process of law.

Rule 23(1)(f) of this Court provides:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of the first instance and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised.

The only reference to a federal issue in Petitioners' statement of the case is the assertion that Petitioners raised the argument that they were denied a claimed property interest without procedural due process of law (Petition at 8). Petitioners' statement of the case contains no reference to a claim below of a deprivation of liberty without due process or a denial of "substantive" due process.

It is clear that these issues were not raised in the proceedings below, and Petitioners have so admitted in their Petition. Even if the Petition for Allowance of Appeal to the Pennsylvania Supreme Court had been granted, these issues could not have been raised, since they were not raised below. *Wenzel v. Morris Distributing Co.*, 439 Pa. 364, 266 A. 2d 662 (1970); *Brunswick Corporation v. Key Enterprises, Inc.*, 431 Pa. 15, 244 A. 2d 658 (1968).

It is well established that a federal issue may not be raised for the first time before this Court. *Moore v. Illinois*, 408 U. S. 786, 799 (1972); *Cardinale v. Louisiana*, 394 U. S. 437 (1969). Since Petitioners did not raise the claims of a deprivation of liberty without due process of law or a denial of "substantive" due process of law, these issues are not properly before this Court for decision.

2. This Case Presents No Substantial Federal Issue of Deprivation of Liberty Without Due Process of Law or Denial of "Substantive" Due Process of Law.

Even assuming, *arguendo*, that Petitioners' allegations of deprivation of liberty without due process or denial of

"substantive" due process were properly presented, they are without merit and present no basis for the granting of a Writ of Certiorari.

The first of these contentions appears to be based upon a claim that Petitioners have been denied liberty in the sense of the right to earn a livelihood, or work for a living. This, however, is not involved in this case. No Petitioner was denied the right to follow a chosen trade or profession. Each remained entirely free to obtain any employment they chose, except the positions with the Philadelphia Housing Authority, from which they were dismissed. See *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895-96 (1961).

In fact, this Court, in its decision in *Roth*, faced a substantially similar claim of deprivation of liberty without due process of law and found that since the nonrenewal of the teacher's contract in that case was not based on a charge of dishonesty or immorality, and there was no suggestion that the Respondent's interests in his "good name, reputation, honor, or integrity" were at stake, there was no deprivation of liberty. As this Court stated:

> It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. 408 U. S. at 575.

Further, this Court stated:

> Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of "liberty". 408 U. S. at 574 n. 13.

Clearly, this portion of the holding in *Roth* applies to this case. Petitioners' discharge did not involve any charge of dishonesty or immorality, nor any suggestion that Petitioners' good name, reputation, honor or integrity were at stake. A dismissal over competing policy considerations and similar matters (See App. at 11b) hardly rises to the "foreclosure of opportunities amounting to a deprivation of liberty."

Finally, Petitioners claim, without the citation of any authority, that this case involves a "fundamental issue of substantive due process." (Petition at 13). Apparently, this claim also includes Petitioners' extravagant hypothetical examples about possible restrictions upon the use of land, which, of course, have nothing whatever to do with the issues of this case.

Since Petitioners cite no authority in support of their claims relating to a denial of "substantive" due process, the basis of that claim is not entirely clear. It is, however, well established that "substantive" due process, to the extent that it is a viable current doctrine, requires only that a state law not be unreasonable, arbitrary or capricious, and that it be reasonably related to the object sought to be attained. *Nebbia v. New York,* 291 U. S. 502, 525 (1934); *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 391 (1937).

The Pennsylvania law involved in this case is not, as Petitioners suggest, that an interest in public employment cannot be a property interest subject to the procedural due process protections of the fourteenth amendment. It is rather, as expressed by the Supreme Court of Pennsylvania in *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A. 2d 278 (1970), that appointed executive public employees, particularly those in charge of implementing the policies of a public agency, may be granted tenure in their employment which precludes summary

dismissal only by the decision of the State legislature expressed in a comprehensive tenure scheme.

The basis for this doctrine and the interests served by it are clearly set forth by the Pennsylvania Supreme Court in the *Scott* Opinion, citing the earlier decision of *Mitchell v. Chester Housing Authority,* 389 Pa. 314, 132 A. 2d 873 (1957), as follows:

> "[G]ood administration requires that the personnel in charge of implementing the policies of an agency be responsible to and responsive to those charged with the policy-making function, who in turn are responsible to a higher governmental authority, or to the public itself, whichever selected them. This chain of responsibility is a basic check on government possessed by the public at large." The power to dismiss summarily is the assurance of such responsibility. 402 Pa. at 154.

This doctrine, which clearly applies to these Petitioners, each of whom held high level, policy-implementing positions, whatever its wisdom, is certainly not arbitrary or capricious, and plainly bears a very real and substantial relation to the object which it seeks to serve.

This conclusion is further reinforced by the fact that the Pennsylvania law involved in this case, which Petitioners now claim is so arbitrary, capricious, and unreasonable as to be a denial of "substantive" due process has been consistently affirmed by this Court as applicable to the United States Government. As this Court stated in *Cafeteria Workers v. McElroy, supra,* a case cited several times by this Court in the *Roth* and *Perry* decisions:

> It has become a settled principle that government employment, in the absence of legislation, can be

revoked at the will of the appointing officer. 367 U. S. at 896.

VI. CONCLUSION.

For all of the foregoing reasons, Respondent The Philadelphia Housing Authority respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that, on this 19th day of December, 1974, three copies of this Brief in Opposition, were hand delivered to the office of Michael Brodie, Esquire, Pechner, Sacks, Dorfman, Rosen & Richardson, Suite 1300, 1845 Walnut Street, Philadelphia, Pennsylvania, Attorney for Petitioners.

I further certify that all parties required to be served have been served.

/s/ HAROLD CRAMER,

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